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IN THE

# Supreme Court of the United States

**October Term, 1973**

No. 73-516

SHERWIN SELIGSOHN,

*Petitioner,*

*v.*

SECURITIES INVESTOR PROTECTION CORPORATION, SECURITIES AND EXCHANGE COMMISSION, and CLAUDE P. HUDSON, Trustee,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## JOINT BRIEF IN OPPOSITION OF RESPONDENTS SECURITIES INVESTOR PROTECTION CORPORATION AND CLAUDE P. HUDSON, TRUSTEE

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### Opinion Below

The unanimous opinion of the Court of Appeals is reported as Securities and Exchange Commission *v.* Aberdeen Securities Co., Inc., 480 F.2d 1121 (3d Cir. 1973). The District Court ruled from the Bench but wrote no opinion.

## Jurisdiction

Respondents Securities Investor Protection Corporation ("SIPC") and Claude P. Hudson, Trustee ("Trustee") (hereinafter jointly referred to as "Respondents")[1] respectfully stress that the decision of the Court of Appeals with respect to Rule 23 of the Federal Rules of Civil Procedure represents a unanimous affirmance of an interlocutory determination involving an exercise of discretion by the District Court (discussed *infra* at page 11).

## Statutes Involved

The petition merely sets forth, in Appendices C & D, the entirety of Rule 23 and the Securities Investor Protection Act of 1970 (15 U.S.C. § 78aaa *et seq.*) ("1970 Act"). It does not identify the particular provisions involved.

As regards the petitioner's substantive rights under the 1970 Act, the principal provisions which are directly or indirectly involved are contained in Section 78fff. Because of its length that section is set forth in the Appendix hereto (pages 4a to 16a), pursuant to Rule 40(1)(c) of this Court. The provisions which the Court of Appeals (and the Respondents) considered controlling in the circumstances of this case are subdivisions (c)(2)(A)(iv) and (g). Subdivision (g) provides, in part:

> "It shall be the duty of the trustee to discharge promptly, in accordance with the provisions of this section, all obligations of the debtor to each of its customers relating to, *or net equities based upon*, securities or cash *by the delivery of securities or the effecting of payments* to such customer (subject to subsection (f)(1), to the extent that such payments

1. Respondent Securities and Exchange Commission did not participate in the appeal to the Court of Appeals.

> are made out of advances from SIPC under such subsection) insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee, whether or not such customer shall have filed formal proof of such claim . . . ." (emphasis added)

Subdivision (c)(2)(A)(iv) provides:

> "(iv) 'net equity' of a customer's account or accounts means the dollar value thereof determined by giving effect to open contractual commitments completed as provided in subsection (d), by excluding any specifically identifiable property reclaimable by the customer, and by subtracting the indebtedness, if any, of the customer to the debtor from the sum which would have been owing by the debtor to the customer had the debtor liquidated, by sale or purchase on the filing date, all other securities and contractual commitments of the customer, and for purposes of this definition, accounts held by a customer in separate capacities shall be deemed to be accounts of separate customers . . . ."

The petitioner, however, relies upon Section 78fff(d) which provides, in pertinent part:

> "(d) COMPLETION OF OPEN CONTRACTURAL (*sic*) COMMITMENTS.—The trustee shall complete those contractual commitments of the debtor relating to transactions in securities which were made in the ordinary course of debtor's business and which were outstanding on the filing date—
>
> (1) in which a customer had an interest, except those commitments the completion of which the Commission shall have determined by rule or regulation not to be in the public interest, or
>
> (2) in which a customer did not have an interest, to the extent that the Commission shall by

> rule or regulation have determined the completion of such commitments to be in the public interest.
>
> For purposes of this subsection (but not for any other purposes of this Act) (i) the term "customer" means any person other than a broker or dealer, and (ii) a customer shall be deemed to have had an interest in a transaction if a broker participating in the transaction was acting as agent for a customer, or if a dealer participating in the transaction held a customer's order which was to be executed as a part of the transaction. . . ."

Regarding Rule 23, in the courts below the petitioner relied upon subdivision (a) which sets forth prerequisites to all class actions, and subdivisions (b) (1) (B) and (b) (3) which set forth additional conditions to the maintenance of a class suit. Should this issue be reached on the merits it would also be essential to consider the nature of a liquidation proceeding under the 1970 Act which in addition to establishing special procedures also incorporates by reference considerable portions of the Bankruptcy Act. The relevant provisions are contained in Sections 78eee and 78fff of the 1970 Act, both of which are set forth in full in the Appendix hereto.

## Questions Presented

(1) Whether this Court should review the decision of the Court of Appeals that the 1970 Act, in particular Section 78fff(d), was not intended to require a trustee to acquire securities in the market in order to satisfy the "net equity" claims of customers based on securities owed them by the broker-dealer in liquidation but which were in fact not among the broker-dealer's assets which came into the trustee's possession.

**(2) Whether the judgment of the Court of Appeals, insofar as it unanimously affirmed the District Court's refusal to invoke Rule 23 of the Federal Rules of Civil Procedure as a matter of law and in the exercise of discretion should be reviewed by this Court.**

## Statement of the Case

Petitioner's statement of the case is correct except that the record does not support the following immaterial statement on page 3 of the petition: "No authority was given to hold stock in street name." In the interest of completeness the following should be added, however.

The petitioner was one of four customers who claimed an aggregate of 1300 Oratronics units. Pursuant to the order of the District Court the trustee made a pro rata distribution to these customers of the 100 units found in the debtor's possession, and paid them cash in lieu of securities in order to satisfy the balance of their net equity claims, as follows:

| Customers | Securities Positions | Securities Delivered | Cash Paid in Lieu |
|---|---|---|---|
| R. Marsh | 200 units | 15 units | $ 624.28 |
| S. & L. Rabin | 500 units | 39 units | $1,555.88 |
| S. Seligsohn | 400 units | 31 units | $1,245.88 |
| N. Sabatini | 200 units | 15 units | $ 624.38 |

The amounts of cash were based upon the value of Oratronics units as of the "filing date" in accordance with Section 78fff (c) (2) (A) (iv).

## Reasons For Denying The Writ

### I.

### The petition is devoid of meaningful argument and should be denied under this Court's Rule 23(4).

The petition does not present any analysis of relevant statutes or cases in order to demonstrate error below. It merely contains some general remarks of members of Congress, quotes a misleading segment of former SEC Chairman Budge's testimony (discussed *infra* at page 11), and suggests generally that the 1970 Act, as construed by the Court of Appeals, does not sufficiently protect public securities customers. Moreover, the entire subject of Rule 23 is ignored except for the naked assertion of the existence of an issue under "Questions Presented". This seems a most appropriate case in which to apply this Court's Rule 23(4) which permits the denial of a petition on account of "[t]he failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration. . . ."

In light of the condition of the petition, it would be sufficient for the Respondents to place complete reliance upon the well-reasoned opinion of the Court of Appeals. However, it seems appropriate to supplement that opinion in light of the novel character of the 1970 Act and the issues herein.

## II.

**The Court of Appeals properly applied the 1970 Act, and no reasons appear which warrant further review by this Court.**

Prior to the 1970 Act stockbroker bankruptcies were conducted in accordance with Section 60e of the Bankruptcy Act [11 U.S.C. § 96(e)]. Section 60e permitted cash customers (as defined) to reclaim cash or securities which could be specifically identified as their property ("specifically identifiable property"). Other customers' cash, securities or similar property constituted a "single and separate fund" to be applied in satisfaction of customers' claims (other than for specifically identifiable property) *on a pro rata basis.* Such customers' claims were for the "net equity" of their accounts—a liquidated sum determined by subtracting the customer's indebtedness to the broker from the sum the broker would have owed the customer had the customer's securities (other than specifically identifiable property) and securities commitments been liquidated on the date of bankruptcy. The unpaid balance of customers' net equities were included among all the claims against the general estate. A more detailed discussion of Section 60e may be found in 3 COLLIER ON BANKRUPTCY ¶¶60.72-60.76, pp. 1166-1201 (14th ed. 1971).

Obviously Section 60e did not prevent customer losses which mounted when the rate of stockbroker failures accelerated in the late 1960's. The Congress responded to the crisis by enacting the 1970 Act which created SIPC, a non-profit membership corporation. The 1970 Act adopts the Section 60e concepts (with some differences not necessary to note here)and continues the right of customers to

**receive their specifically identifiable property (as defined) and otherwise to share *ratably* in the single and separate fund based on their net equities [Sections 78fff (c) (2) (A), (B) and (C)].[2] The dramatic difference is the creation of SIPC and the availability of its own funds to satisfy the net equities of customers, within certain limits, notwithstanding the inadequacy of cash or securities in the single and separate fund [Section 78fff (f)]. With the creation of SIPC and its fund it was also possible to add a new**

2. The 1970 Act is substantially the same as the bill previously passed by the House of Representatives [Conference Report H.R. No. 91-1788, 91st Cong., 2d Sess. 11 (1970)]. On the aspects pertinent to this appeal both the House and Senate versions were the same [H.R. 19333, 91st Cong., 2d Sess. (1970) and S. 2348, 91st Cong., 2d Sess. (1970)]. The House Report accompanying H.R. 19333 stated:

> "Section 60e provides for the return to customers of fully paid securities which are 'specifically identifiable' as their property. The bill carries forward the 60e concept of specific identification except that, among other things, identification need be made only as of the filing date . . . and except that the bill makes it clear that securities held in bulk segregation or in central certificate services are specifically identifiable. . . .
>
> "Section 60e also provides that property held for customers (other than specifically identifiable property) constitutes a single and separate fund in which customers of the debtor are entitled to share ratably. This concept is carried forward in the bill, except that it is intended that, *to the extent possible*, the trustee will deliver to a customer against his claim for securities, the same securities (that is, securities of the same issuer, class, and series) which were held for his account on the filing date. For purposes of valuing claims of customers for securities and the extent to which they have been discharged, *securities will be valued as of the filing date. To the extent that property in the single and separate fund is insufficient* to discharge claims of customers payable out of that fund, SIPC is required to advance funds to the trustee to discharge such claims. SIPC would not be required to advance more than $50,000 per customer." [H.R. No. 91-1613, 91st Cong., 2d Sess. 10 (1970)] (emphasis added)

The same statement almost *in haec verba* was made in the Senate Report [S.R. No. 91-1218, 91st Cong., 2d Sess. 11-12 (1970).]

area of protection designed to prevent the so-called "domino effect", *i.e.*, the potential which the failure of one broker-dealer has for causing the failure of one or more other broker-dealers with which the failed firm may have substantial open securities transactions. The relevant section in this regard is Section 78fff (d), mistakenly relied on by the petitioner, which authorizes the completion of certain open contractual commitments which were outstanding between the defunct firm and other broker-dealers.

The 1970 Act recognizes that by reason of the unlawful hypothecation or other transfer of customers' securities, and other events usually associated with firms in financial distress, both the single and separate fund and certain classifications of specifically identifiable property would probably be insufficient to permit the return to customers of all their securities positions. With respect to specifically identifiable property, Section 78fff (c) (2) (C) specifically authorizes the distribution of available securities on a pro rata basis "[i]f there is any shortage in securities of the same class and series of an issuer" segregated in bulk or otherwise constituting specifically identifiable property. With regard to net equity claims based on securities, Section 78fff (c) (2) (B) provides that such claimants "constitute a single and separate class of creditors, *entitled to share ratably* in such fund on the basis of their respective net equities" (emphasis added). It further provides that "[i]f such single and separate fund shall not be sufficient" customers are entitled to share in the general estate with general creditors to the extent of the unpaid balance of their respective net equities. Section 78fff (g) (2) authorizes the trustee to deliver securities "to the extent available . . . with partial deliveries to be made pro rata to the greatest extent considered practicable by the trustee".

Other provisions even more persuasively demonstrate that customers having net equity claims may well receive cash in lieu of securities. Thus, Section 78fff (b) (2) specifically gives the trustee discretion to ". . . reduce to money any securities in the single and separate fund. . . ." Section 78fff (c) (2) (B) merely requires the return of securities in the single and separate fund "[t]o the greatest extent considered practicable by the trustee. . . ." Indeed, Section 78fff (c) (2) (D) authorizes the trustee to complete open contractual commitments with other broker-dealers using, if necessary, ". . . all property in the single and separate fund. . . ." And finally, although customers with net equities based on securities have a ratable class interest in the single and separate fund, Section 78fff (c) (2) (B) gives their interest tertiary priority after (i) repayment to SIPC of advances made to complete open contractual commitments under Section 78fff (d), and (ii) the payment of certain costs and expenses of the liquidation proceeding allocable to the single and separate fund.

The Court of Appeals was clearly correct. Under Section 78fff (c) (2) (A) (iv) a customer's net equity is a net "dollar amount" calculated as though the account were liquidated. Whether that liquidated claim will be satisfied by cash or securities, or a combination of both, depends upon the composition of the single and separate fund as the trustee finds it, subject to the trustee's discretion and the effect of the other statutory provisions referred to above. The petitioner's position would render nugatory the plain statutory scheme, a result which familiar rules of statutory construction will not countenance. *Bays Markets, Inc.* v. *Retail Clerk's Union*, 398 U.S. 235, 250 (1970); *N. L. R. B.* v. *Lion Oil Co.*, 352 U.S. 282, 288 (1957); *Mastro Plastics Corp.* v. *N. L. R. B.*, 350 U.S. 270, 286

(1956); *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955).

As noted earlier there is little in the petition to which to respond. It should be noted that the statement which the petition attributes to former SEC Chairman Budge is incomplete. The complete statement is set forth in footnote 8 to the opinion of the Court of Appeals, and it clearly shows that Chairman Budge said nothing to support the petitioner's view. Chairman Budge gave similar testimony before the Senate Subcommittee on Banking and Currency, and he made clear again that Section 78fff (d) was intended to apply to certain open "interdealer transactions."[3] The petition also states (page 5) that "[t]he impact of the decision below on the public customers of broker-dealers is enormous." The only discernible impact is that the 1970 Act, as correctly applied by the Court of Appeals, has provided the petitioner with substantial benefits which would not have been available before the legislation.

The Respondents submit that the Court of Appeals properly concluded that Congress never intended that Section 78fff (d) be used to satisfy customers' net equities based on securities by requiring the trustee to acquire missing securities in the market. There is no conflict of opinion on this point among the circuits, and no other reason appears which warrants review by this Court.

---

3. "We have also recognized that many interdealer transactions may be for the account of customers. Where this is so, the coverage also applies. The bill would require completion of securities transactions of the debtor broker-dealer made in the ordinary course of its business and outstanding on the date the Corporation petitions the court for the appointment of a trustee, if such transaction involves a customer of the debtor or of another broker or dealer who entered into such transaction on behalf of such customer.

Open transaction between the debtor and other brokers or dealers where neither was acting on behalf of a customer could not be completed by the trustee unless the Commission, by rule or regulation, determined that the completion of such commitments are in the public interest." Hearings on S. 2348, S. 3988 and S. 3989 Before the Subcommittee on Securities of the Senate Committee on Banking and Currency, 91st Cong. 2d Sess. 257 (1970).

## III.

**The Court of Appeals' unanimous affirmance of the District Court's interlocutory discretionary determination not to invoke Rule 23 of the Federal Rules of Civil Procedure should not be reviewed by this Court.**

In view of the petition's inexplicable silence on this point these Respondents will not address the issue tendered in the Court of Appeals. It is evident that the procedures established by the 1970 Act, Section 78fff (c) (1) of which makes applicable various provisions of the Bankruptcy Act, contemplate the actual disposition of the rights of all customers and other creditors. To engraft Rule 23 procedures upon that most adequate statutory scheme would impose burdens and expense without achieving more than the 1970 Act itself achieves. The Respondents rely upon the opinion of the Court of Appeals.

Apart from the patent correctness of the decisions below, other considerations exist which militate against the grant of a writ of certiorari. The determination below involved an exercise of discretion by a district judge, sustained by a unanimous Court of Appeals, with respect to the application of a rule of federal civil procedure. This Court will not ordinarily review such determinations. *Appalachian Power Co.* v. *American Institute of Certified Public Accountants,* 80, S. Ct. 16, *cert. denied,* 361 U.S. 887 (1959). Moreover, the principle has long been established that this Court will not grant a writ of certiorari to review an interlocutory determination except in rare cases involving extraordinary circumstances. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.,* 240 U.S. 251, 258 (1916); *City and County of Denver* v. *New York Trust Co.,* 229 U.S. 123, 133 (1912); *Forsyth* v. *City of Hammond,* 166 U.S. 506, 514

(1897); *Chicago & N. W. Ry. Co.* v. *Osborne*, 146 U.S. 354, 357 (1892); STERN & GRESSMAN, SUPREME COURT PRACTICE pp. 12-15, 130-131 (2d ed. 1954); ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §130, p. 231 (1951). Such circumstances do not exist here.

## CONCLUSION

For the reasons stated above, the Respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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# APPENDIX

## SECTIONS 78eee AND 78fff OF THE SECURITIES INVESTOR PROTECTION ACT OF 1970

§ 78eee. Protection of customers

(a) Determination of need of protection.—

(1) Notice to SIPC.—If the Commission or any self-regulatory organization is aware of facts which lead it to believe that any broker or dealer subject to its regulation is in or is approaching financial difficulty, it shall immediately notify SIPC, and, if such notification is by a self-regulatory organization, the Commission.

(2) Action by SIPC.—If SIPC determines that any member has failed or is in danger or failing to meet its obligations to customers and that there exists one or more of the conditions specified in subsection (b) (1) (A) of this section, SIPC, upon notice to such member, may apply to any court of competent jurisdiction specified in section 78aa or 78u(e) of this title for a decree adjudicating that customers of such member are in need of the protection provided by this chapter.

(3) Effect of other pending actions.—An application under paragraph (2)—

(A) with the consent of the Commission, may be combined with any action brought by the Commission including an action by it for a temporary receiver pending an appointment of a trustee under subsection (b) (3) of this section, and

(B) may be filed notwithstanding the pendency in the same or any other court of any bankruptcy, mortgage foreclosure, or equity receivership proceeding or any proceeding to reorganize, conserve,

or liquidate such member or its property, or any proceeding to enforce a lien against property of such member.

(b) Court action.—

(1) Issuance of decree.—

(A) Findings by court.—A court to which application is made pursuant to subsection (a) (2) of this section shall grant the application and issue a decree adjudicating that customers of the member named in the application are in need of protection under this chapter if it finds that such member—

(i) is insolvent within the meaning of section 1(19) of Title 11, or is unable to meet its obligations as they mature, or

(ii) has committed an act of bankruptcy within the meaning of section 21 of Title 11, or

(iii) is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such member has been appointed, or

(iv) is not in compliance with applicable requirements under the 1934 Act or rules or regulations of the Commission or any self-regulatory organization with respect to financial responsibility or hypothecation of customers' securities, or

(v) is unable to make such computations as may be necessary to establish compliance with such financial responsibility or hypothecation rules or regulations.

(B) Uncontested, etc., applications.—If within three business days after the filing of an application pursuant to subsection (a) (2) of this section, or such other period as the court may order, the debtor

shall consent to or fail to contest such application or shall fail to show facts sufficient to controvert any material allegation of such application, the court shall forthwith grant the application and issue a decree adjudicating that customers of the member named in the application are in need of protection under this chapter.

(2) Exclusive jurisdiction over debtor.—Upon the filing of an application pursuant to subsection (a) (2) of this section, the court to which application is made shall have exclusive jurisdiction of the debtor involved and its property wherever located with the powers, to the extent consistent with the purposes of this chapter, of a court of bankruptcy and of a court in a proceeding under chapter X of the Bankruptcy Act. Pending an adjudication under paragraph (1) such court shall stay, and upon appointment by it of a trustee as provided in paragraph (3) such court shall continue the stay of, any pending bankruptcy, mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the debtor or its property and any other suit against any receiver, conservator, or trustee of the debtor or its property. Pending such adjudication and upon the appointment by it of such trustee, the court may stay any proceeding to enforce a lien against property of the debtor or any other suit against the debtor. Pending such adjudication, such court may appoint a temporary receiver.

(3) Appointment of trustee.—If the court grants an application and makes an adjudication under paragraph (1), the court shall forthwith appoint as trustee for the liquidation of the business of the debtor in accordance with section 6, and as attorney for such trustee, such persons as SIPC shall specify. No person shall be appointed as such

trustee or attorney if such person is not "disinterested" within the meaning of section 558 of Title 11.

(4) Debtor and filing date defined.—For purposes of this chapter—

(A) Debtor.—The term "debtor" means a member of SIPC in respect of whom an application has been filed pursuant to subsection (a) (2) of this section.

(B) Filing date.—The term "filing date" means the date on which an application with respect to any debtor is filed under subsection (a) (2) of this section that if—

(i) a petition was filed before such date by or against the debtor under the Bankruptcy Act, or

(ii) the debtor is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such debtor was appointed which proceeding was commenced before the date on which such application was filed,

then the term "filing date" means the date on which such petition was filed or such proceeding commenced.

(c) SEC participation in proceedings.—The Commission may, on its own motion, file notice of its appearance in any proceeding under this chapter and may thereafter participate as a party.

§ 78fff. Liquidation proceedings

(a) General purposes of liquidation proceeding.—The purposes of any proceeding in which a trustee has been appointed under section 78eee(b) (3) of this title (hereafter in this section referred to as a "liquidation proceeding") shall be:

(1) as promptly as possible after such appointment and in accordance with the provisions of this section—

(A) to return specifically identifiable property to the customers of the debtor entitled thereto;

(B) to distribute the single and separate fund, and (in advance thereof or concurrently therewith) pay to customers moneys advanced by SIPC, as provided in subsection (f) of this section;

(2) to operate the business of the debtor in order to complete open contractual commitments of the debtor pursuant to subsection (d) of this section;

(3) to enforce rights of subrogation as provided in this chapter; and

(4) to liquidate the business of the debtor.

(b) Powers and Duties of Trustee.—

(1) Trustee powers.—A trustee appointed under section 78eee (b) (3) of this title (hereinafter referred to as "trustee") shall be vested with the same powers and title with respect to the debtor and the property of the debtor, and the same rights to avoid preferences, as a trustee in bankruptcy and a trustee under chapter X of the Bankruptcy Act have with respect to a bankrupt and a chapter X debtor.

In addition, a trustee shall have the right—

(A) with the approval of SIPC, to hire and fix the compensation of all personnel (including officers and employees of the debtor and of its examining authority) and other persons (including but not limited to accountants) that are deemed by such trustee necessary for all or any purposes of the liquidation proceeding, and

(B) to operate the business of the debtor in order to complete open contractual commitments pursuant to subsection (d) of this section,

and no approval of the court shall be required therefor.

(2) Trustee duties.—Except as inconsistent with the provisions of this chapter or otherwise ordered by the court, a trustee shall be subject to the same duties as a trustee appointed under section 72 of Title 11, except that a trustee may, but shall have no duty to reduce to money any securities in the single and separate fund (provided under subsection (c) (2) (B) of this section) or in the general estate of the debtor.

(c) Application of Bankruptcy Act.—

(1) General provisions applicable.—Except as inconsistent with the provisions of this chapter and except that in no event shall a plan of reorganization be formulated, a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under, the provisions of chapter X and such of the provisions (other than section 96(e) of Title 11) of chapters I to VII, inclusive, of the Bankruptcy Act as section 502 of Title 11 would make applicable if an order of the court had been entered directing that bankruptcy be proceeded with pursuant to the provisions of such chapters I to VII, inclusive; except that the court may, for such period as may be appropriate, stay enforcement of, but shall not abrogate, the rights provided in section 108 of Title 11 and the right to enforce a valid, non-preferential lien or pledge against the property of the debtor. For purposes of applying the Bankruptcy Act in carrying out this section, any reference in the Bankruptcy Act to the date of commencement of proceedings under the Bankruptcy Act shall be deemed to be a reference to the filing date (as defined in section 78eee (b) (4) (B) of this title).

(2) Special provisions.—The following subparagraphs of this paragraph shall apply to a liquidation proceeding in lieu of section 96(e) of Title 11:

(A) Definitions.—Except as otherwise expressly provided in this section, for purposes of this section and the application of the Bankruptcy Act to a liquidation proceeding—

(i) "property" includes cash and securities, whether or not negotiable and all property of a similar character;

(ii) "customers" of a debtor means persons (including persons with whom the debtor deals as principal or agent) who have claims on account of securities received, acquired, or held by the debtor from or for the account of such persons (I) for safekeeping, or (II) with a view to sale, or (III) to cover consummated sales, or (IV) pursuant to purchases, or (V) as collateral security, or (VI) by way of loans of securities by such persons to the debtor, and shall include persons who have claims against the debtor arising out of sales or conversions of such securities, and shall include any person who has deposited cash with the debtor for the purpose of purchasing securities, but shall not include any person to the extent that such person has a claim for property which by contract, agreement, or understanding, or by operation of law, is part of the capital of the debtor or is subordinated to the claims of creditors of the debtor;

(iii) "cash customer" means, with respect to any securities or cash, customers entitled to immediate possession of such securities or cash without the payment of any sum to the debtor, and for purposes of this clause, the same person may be a cash customer with reference to certain securities or cash and not a cash customer with reference to other securities or cash;

(iv) "net equity" of a customer's account or accounts means the dollar amount thereof determined by giving effect to open contractual commitments completed as provided in subsection (d) of this section, by excluding any specifically identifiable property reclaimable by the customer, and by subtracting the indebtedness, if any, of the customer to the debtor from the sum which would have been owing by the debtor to the customer had the debtor liquidated, by sale or purchase on the filing date, all other securities and contractual commitments of the customer, and for purposes of this definition, accounts held by a customer in separate capacities shall be deemed to be accounts of separate customers; and

(v) "securities" has the same meaning as such term has under section 96(e) of Title 11.

(B) Single and separate fund.—All property at any time received, acquired, or held by or for the account of a debtor from or for the account of customers except cash customers who are able to identify specifically their property in the manner prescribed in subparagraph (C), and the proceeds of all customers' property transferred by the debtor, including property unlawfully converted, shall constitute a single and separate fund; and all customers except such cash customers shall constitute a single and separate class of creditors, entitled to share ratably in such fund on the basis of their respective net equities as of the filing date and in priority to all other payments, except that (i) there shall be repaid to SIPC, in priority to all other claims payable from such single and separate fund, the amount of all advances made by SIPC to the trustee to permit the completion of open contractual commitments pursuant to subsection (d) of this section, and (ii) to the extent that any other assets of the debtor may be available therefor or as otherwise ordered by the

court, all costs and expenses specified in clauses (1) and (2) of section 104(a) of Title 11 shall be paid from such single and separate rate fund in priority to the claims of such single and separate class of creditors, and any moneys advanced by SIPC for such costs and expenses shall be recouped as such. If such single and separate fund shall not be sufficient to pay in full the claims of such single and separate class of creditors, the creditors of such class shall be entitled, to the extent only of their respective unpaid balances, to share in the general estate with general creditors. In, or for the purpose of, distributing such fund, all property other than cash shall be valued as of the close of business on the filing date. To the greatest extent considered practicable by the trustee, the trustee shall deliver in payment of claims of customers for their net equities based upon securities held on the filing date in their accounts (after giving effect to open contractual commitments completed as hereinafter provided), securities of the same class and series of an issuer ratably up to the respective amounts which were so held in such accounts. Any property remaining after the liquidation of a lien or pledge made by a debtor shall be apportioned between his general estate and the single and separate fund in the proportion in which the general property of the debtor and the property of his customers contributed to such lien or pledge.

(C) Specifically identifiable property.—The trustee shall return specifically identifiable property to the customers of the debtor, entitled thereto. No cash or securities at any time received, acquired, or held by or for the account of a debtor from or for the accounts of customers shall for the purposes of this paragraph be deemed to be specifically identified, unless such property remained in its identical form in the debtor's possession until the filing date, or unless such property was allocated to or physically

set aside for such customers on the filing date. In determining whether property was allocated to or physically set aside for such customers, it shall be sufficient that on the filing date:

(i) securities are segregated individually, or in bulk for customers collectively;

(ii) in the case of securities held for the account of the debtor as part of any central certificate service of any clearing corporation or any similar depositary—

(I) the records of the debtor show or there is otherwise established to the satisfaction of the trustee that all or a specified part of the securities held by such clearing corporation or other similar depositary are held for specified customers, or for customers collectively, and

(II) such records of the debtor also show or there is otherwise established to the satisfaction of the trustee the identities of the particular customers entitled to receive specified numbers or units of such securities so held for customers collectively; or

(iii) such property is held for the account of customers of the debtor in such other manner as the Commission, for the protection of customers and other creditors on a fair and equitable basis, by rule or regulation shall have determined to be sufficiently identifiable as the property of such customers.

If there is any shortage in securities of the same class and series of an issuer so segregated in bulk or otherwise held for customers pursuant to this subparagraph, as compared to the aggregate rights of particular customers to receive securities of such class and series, the respective interests of such customers in such securities of such class and series shall be prorated, without prejudice, however, to the sa-

tisfaction of any claim for deficiencies as otherwise provided in this section.

(D) Where such single and separate fund is not sufficient to pay in full the claims of such single and separate class of creditors, a transfer by a debtor of any property which, except for such transfer, would have been a part of such fund may be recovered by the trustee for the benefit of such fund, if such transfer is voidable or void under the provisions of the Bankruptcy Act. For the purpose of such recovery, the property so transferred shall be deemed to have been the property of the debtor and, if such transfer was made to a customer or for his benefit, such customer shall be deemed to have been a creditor, the laws of any State to the contrary notwithstanding. Subject to the provisions of paragraph (D), if any securities received or acquired by a debtor from a cash customer are transferred by the debtor, such customer shall not have any specific interest in or specific right to any securities of like kind on hand on the filing date, but such securities of like kind or the proceeds thereof shall be come part of such single and separate fund.

(d) Completion of open contractural (sic) commitments. —The trustee shall complete those contractual commitments of the debtor relating to transactions in securities which were made in the ordinary course of debtor's business and which were outstanding on the filing date—

(1) in which a customer had an interest, except those commitments the completion of which the Commission shall have determined by rule or regulation not to be in the public interest, or

(2) in which a customer did not have an interest, to the extent that the Commission shall by rule or regulation have determined the completion of such commitments to be in the public interest.

For purposes of this subsection (but not for any other purpose of this chapter) (i) the term "customer" means any person other than a broker or dealer, and (ii) a customer shall be deemed to have had an interest in a transaction if a broker participating in the transaction was acting as agent for a customer, or if a dealer participating in the transaction held a customer's order which was to be executed as a part of the transaction. All property at any time received, acquired, or held by or for the account of the debtor except for cash or securities that are specifically identifiable as the property of particular customers and are not the subject of an open contractual commitment), and all property in the single and separate fund, shall be available to complete open contractual commitments pursuant to this subsection. Securities purchased or cash received by the trustee upon completion of any such commitment shall constitute specifically identifiable property of a customer to the extent that such commitment was completed with property which constituted specifically identifiable property of such customer on the filing date, or was paid or delivered by or for the account of such customer to the debtor or the trustee after the filing date.

(e) Notice.—Promptly after his appointment, the trustee shall cause notice of the commencement of proceedings under this section to be published in accordance with a designation of the court, made in accordance with the requirements of section 51 of Title 11, and at the same time shall cause to be mailed a copy of such notice to each of the customers of the debtor as their addresses shall appear from the debtor's books and records. Except as the trustee may otherwise permit, claims for specifically identifiable property (other than securities registered in the name of the claimant or segregated for him in his individual name)

or claims payable from property in the single and separate fund or payable with moneys advanced by SIPC, shall not be paid other than from the general estate of the debtor unless filed within such period of time (not exceeding sixty days after such publication) as may be fixed by the court, and no claim shall be allowed after the time specified in section 93 of Title 11. Subject to the foregoing, and without limiting the powers and duties of the trustee to discharge promptly obligations as specified in this section, the court may make appropriate provision for proof and enforcement of all claims against the debtor including those of any subrogee.

(f) SIPC advances to trustee.—

(1) Advances for customers' claims.—In order to provide for prompt payment and satisfaction of the net equities of customers of debtor, SIPC shall advance to the trustee such moneys as may be required to pay or otherwise satisfy claims in full of each customer, but not to exceed $50,000 for such customer; except that—

(A) insofar as all or any portion of the net equity of a customer is a claim for cash, as distinct from securities, the amount advanced by reason of such claim to cash shall not exceed $20,000,000;

(B) a customer who holds accounts with the debtor in separate capacities shall be deemed to be a different customer in each capacity;

(C) no such advance shall be made by SIPC to the trustee to pay or otherwise satisfy, directly or indirectly, any claims of any customer who is a general partner, officer, or director of the debtor, the beneficial owner of 5 per centum or more of any class of equity security of the debtor (other

than a non-convertible stock having fixed preferential dividend and liquidation rights) or limited partner with a participation of 5 per centum or more in the net assets or net profits of the debtor; and

(D) no such advance shall be made by SIPC to the trustee to pay or otherwise satisfy claims of any customer who is a broker or dealer or bank other than to the extent that it shall be established to the satisfaction of the trustee, from the books and records of the debtor of form the books and records of a broker or dealer or bank or otherwise, that claims of such broker or dealer or bank against the debtor arise out of transactions for customers of such broker or dealer or bank, in which event, each such customer of such broker or dealer or bank shall be deemed a separate customer of the debtor.

To the extent that moneys are advanced by SIPC to the trustee to pay the claims of customers, SIPC shall be subrogated to the claims of such customers with the rights and priorities provided in this section.

(2) Other advances.—SIPC may advance to the trustee such moneys as may be required to effectuate subsection (b) (1) (A) of this section. SIPC shall advance to the trustee such moneys as (with those available pursuant to subsection (d) of this section) may be required to effectuate subsection (d) of this section.

(g) Payments to customers; no proof of claim required. —It shall be the duty of the trustee to discharge promptly, in accordance with the provisions of this section, all obligations of the debtor to each of its customers relating to, or net equities based upon, securities for cash by the delivery of securities or the effecting of payments to such customer

(subject to subsection (f) (1) of this section, to the extent that such payments are made out of advances from SIPC under such subsection) insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee, whether or not such customer shall have filed formal proof of such claim. For that purpose the court among other things shall—

(1) in respect of claims relating to securities or cash, authorize the trustee to make payment out of moneys made available to the trustee by SIPC notwithstanding the fact that there shall not have been any showing or determination that there are sufficient funds of the debtor available to make such payment; and

(2) in respect of claims relating to, or net equities based upon, securities of a class and series of an issuer, which are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee, authorize the trustee to deliver securities of such class and series if and to the extent available to satisfy such claims in whole or in part, with partial deliveries to be made pro rata to the greatest extent considered practicable by the trustee.

Any payment or delivery of property pursuant to this subsection may be conditioned upon the trustee requiring claimants to execute in a form to be determined by the trustee, appropriate receipts, supporting affidavits, and assignments, but shall be without prejudice to the right of any claimant to file formal proof of claim within the period specified in subsection (e) of this section for any balance of securities or cash to which he may deem himself entitled.

**(h) Proof of claim by associates and others.—The provisions of this section permitting discharge of obligations of the debtor to pay cash or to deliver securities without formal proof of claim shall not apply to any person "associated" with the dobtor as defined in section 78(a) (18) of this title, to any beneficial owner of 5 per centum or more of the voting stock of the debtor, or to any member of the immediate family of any of the foregoing.**

(i) Reports by trustee to court.—All reports to the court by a trustee (other than reports required to be filed pursuant to section 567(3) of Title 11) shall be in such form and detail as, having due regard to the requirements of section 787q of this title and the rules and regulations thereunder and the magnitude of items and transactions involved in connection with the operations of a broker or dealer, the Commission shall determine by rules and regulations to present fairly the results of such proceeding as at the dates or for the periods covered by such reports.

(j) Effect of chapter on claims.—Except as otherwise provided in this section, nothing in this section shall limit the right of any person to establish by formal proof such claims as such person may have to payment, or to delivery of specific securities, without resort to moneys advanced by SIPC to the trustee.